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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 298

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

ARMOUR AND COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE LAWYERS PRINTING CO., INC.

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JURISDICTION.

The judgment order in this case was entered by the United States Court of Appeals for the Seventh Circuit on May 6, 1958. This was a formal judgment order and was separate and distinct from the opinion of the Court. The petition for certiorari was filed in this Court on August 22, 1958, one hundred and eight days after the entry of the judgment. No petition for rehearing was filed in the Court of Appeals and the period for applying for a writ of certiorari has not been extended by a Justice of this Court.

QUESTIONS PRESENTED FOR REVIEW.

There was only one issue presented in the Courts below. Did the removal of the spur track and mill from which the railroad station, Hurst Mill Spur, Iowa, took its name, and the absence of removal of all other physical facilities except the main line railroad tracks, render the rates published to and from that station void as a matter of law? The only possible issue here would be the correctness of the ruling of the lower Courts that the removal of said facilities did not render such published rates void as a matter of law.

STATEMENT OF THE CASE.

This is a suit brought by respondent, Armour and Company, pursuant to Section 16(2) of the Interstate Commerce Act (49 U. S. C. Section 16(2)) to recover overcharges (in violation of sub section 7 of Section 6 of such Act) in excess of the published rate on fresh meat shipments from Kansas City, Kansas, South Omaha, Nebraska and South St. Joseph, Missouri, to numerous destinations in the Eastern part of the United States. An award of reparation was made by the Interstate Commerce Commission. This was relied on as prima facie evidence of the truth of the factual allegations. The proceeding in the District Court was a suit at law based on the overcharge and was not an action to enforce the award of the Interstate Commerce Commission. *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 661.

In the case of fresh meat shipments from the origins to the destinations here involved, the railroads do not follow the normal practice of publishing one factor commodity rates. Instead, these rates are so published that to ascertain the effective rate at any time, it is necessary to find the lowest aggregate of rates based on any intermediate point on any route which is authorized under the Class-

Rate Tariff. There were routes authorized under the Class Rate Tariff during the reparation period through Hurst Mill Spur, Iowa. The aggregate of the rates to and from Hurst Mill Spur, Iowa was lower than any other aggregate of rates published during this period.

As stated in the last paragraph of the decision of the Court of Appeals, the rates to and from Hurst Mill Spur were deliberately published. Through mistake, the outbound rate from that point was only increased 25% rather than 30% as intended, but the publication and maintenance of a rate was not inadvertent (see also pages 6, 7 and 8—Additional Appendix).

The reparation period was from May 6, 1948 through September 5, 1949. It was stipulated between the parties that Hurst Mill Spur was a location on the main line tracks of the Milwaukee Railroad along the West Bank of the Mississippi River; that at one time there had been a spur track leading off from the main line track to a saw mill owned by a man named Alfred Hurst; that by 1933 all physical facilities other than the main line tracks had been removed (App. 46, 47). Petitioners' conclusion that Hurst Mill Spur had disappeared is solely their characterization of the stipulated facts. In his opening statement to the trial court, counsel for petitioners conceded that the location of Hurst Mill Spur could be physically ascertained during the reparation period (Additional Appendix, page 4). Both Courts below determined that the absence of physical facilities other than a through track is no evidence that the publication of rates to and from that point has no purpose. Rates are frequently published to and from points where there is no expectation of any local movement of freight. Important through live stock rates are made over East Burlington, Illinois, and there are no physical facilities at that point other than the main line tracks of the Burlington Railroad. The Interstate Commerce Com

mission, the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit have decided the issues in favor of respondent. The decisions of both Courts were based upon their own examination of the facts and law rather than in reliance upon the expertise of the Commission.

ARGUMENT.

I. JURISDICTION.

This Court should dismiss or deny the petition for certiorari because it was not filed within the statutory period. *Toledo Scale Company* v. *Computing Scale Company*, 261 U. S. 399, 417, 418. The petition flagrantly violates Rule 23 of this Court by failing to state the date of the entry of the judgment by the Court of Appeals. That judgment was entered May 6, 1958. The petition for certiorari was filed 108 days later, to-wit, on August 22, 1958. Paragraph C of Section 2101 of Title 28 U. S. C. provides that the petition must be filed within ninety days of the date of the judgment. No petition for rehearing was filed in the Court of Appeals and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (Rule 34 of this Court).

In lieu of stating the date of the entry of the judgment, petitioners cite May 26, 1958, the date of the physical return of the mandate from the Court of Appeals to the District Court, as the effective date, and cite *Commissioner of Internal Revenue* v. *Estate of Bedford, et al.*, 325 U. S. 283, as authority. That case is not in point for two reasons:

First—The "*Bedford*" case came up from the Second Circuit where the then current practice was to not immediately enter any judgment order unless the opinion itself constituted such order. This Court found that the opinion was not a judgment and further found that the order for mandate did contain all the elements of a judgment and would be construed to be the judgment order. Consequently, the time for filing a petition for certiorari ran from the date of the entry of the order for mandate. This

Court suggested that the Second Circuit amend its practice to conform to that of the other circuits. The practice of the Court of Appeals of the Seventh Circuit is entirely different. Rule 23 of its General Rules of Practice provides that on the date the opinion is handed down, a formal judgment order shall be entered and copies of the opinion shall be mailed to attorneys of record. This course of action was followed in the instant case.

Petitioners' second paragraph under the heading "Jurisdiction" is more significant for what it fails to say than for what it actually says. Literally, the statement in the first sentence is probably true. Nevertheless, petitioners did have notice of the entry of the judgment. The rules of practice provide that the judgment shall be entered on the same day the opinion is filed and a copy of the opinion was concurrently mailed to petitioners. This constitutes notice, even assuming notice was required.

If we assume that petitioners overlooked this notice, no injury resulted. It is apparent that at least by May 26, 1958, they knew the judgment had been entered. This was long prior to August 4, 1958, the last day under the Statute for filing the petition. If, after discovering that the judgment was entered, petitioners did not feel that they had sufficient time in which to prepare a petition for certiorari and persuaded this Court of the necessity, they had a clear remedy by filing an application under paragraph 4 of Rule 22 for an extension of time.

The second distinction between the instant case and the *"Bedford"* case is that there the time was held to run from the entry of the order for mandate. In the instant case there was no order for mandate. Petitioners refer not to any order but to the physical act of the Clerk of the Court in returning the mandate to the District Court. Rule 28 of the General Rules of Practice of the Court of Appeals provides that in the absence of an order to the contrary

and in the absence of a petition for rehearing, the mandate shall issue as of course twenty days after the entry of judgment. Rules 23 and 28 of the General Rules of Practice of the Court of Appeals of the Seventh Circuit are attached hereto as Appendix A to this Brief.

II. THE PETITION SHOWS NO SOUND REASON WHY THIS COURT SHOULD REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

Even had the petition been timely filed, it presents no justification for this Court issuing a writ of certiorari to review the decision of the Court of Appeals. It is necessary to go back to the issues as tried in the District Court and the Court of Appeals to ascertain if there is present here any issue even remotely resembling those set forth in Rule 19 of this Court.

In our statement of facts we have shown that under the peculiar method of publishing rates on fresh meat adopted by petitioners, the effective rate at all times is the lowest aggregate of rates to and from any point on any route authorized by the Class Rate Tariff. During the reparation period, the lowest aggregate was made over Hurst Mill Spur, Iowa. Petitioners contended these published rates to and from Hurst Mill Spur were void because of the absence of any physical facilities other than the main line tracks of the Milwaukee Railroad. The sole question presented was whether the facts set forth in paragraph 5 of the stipulation (Appendix pages 46, 47) nullified the published rates as a matter of law.

Petitioners cited no statute or decision which in any way suggests that a railroad station needs any physical facility other than a through railroad track. Superficially, their argument might have appeared plausible if they could have persuaded the Court to take judicial notice of something that is not a fact—namely, that such a railroad station and

the rates to and from such a station could serve no useful function. Respondent blocked this by proof that there is a real and proper purpose for such stations and such rates.

Petitioners contended that the equities were in their favor. This contention was based solely on the fact that the operation of two sound and well established principles of law happened to react to their detriment in this particular case. Their contentions here that the judgment of the Court of Appeals is "contrary to basic principles of justice" and "so gross a miscarriage of justice" are similarly based.

The first of these principles is that where a charge in excess of the published rate is shown, the injury is conclusive and no proof of damage is required. In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, this Court said at page 202:

> "* * * But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge * * *".

Some of the reasons behind this are disclosed by this Court in its discussion in *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U. S. 531, at pages 533 to 535. It might be noted that this latter opinion is by Mr. Justice Holmes who is known for adherence to basic principles of justice.

The second principle is that the published tariff rate and only the published rate must be collected regardless of any other consideration. This has been the invariable holding of the Interstate Commerce Commission and of the Courts in a long series of well considered opinions. Among the numerous decisions of this Court enforcing this policy are

Louisville & Nashville Railroad Company v. *Maxwell*, 237 U. S. 94, 97.

New York Central & Hudson River Railroad Company v. *York & Whitney Company*, 256 U. S. 406-408.

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. *Fink*, 250 U. S. 577, 580-582.

Davis v. *Portland Seed Co.*, 264 U. S. 403, 424.

Petitioners may not be so ready to assert that there was a gross miscarriage of justice in the first three of these cases where the carriers were allowed to recover the published rates although the shipper had been misled to his detriment.

In the Courts below petitioners neither disputed the existence nor challenged the soundness of these two principles. Instead, they asserted that the result which flows solely from the application thereof was "inequitable" and that the Court should take this into consideration in passing on their asserted defense. Both the District Court and the Court of Appeals carefully examined the alleged defense asserted by petitioners and recognized it for the sham it was.

The overall equities of this case, although irrelevant, are with respondent. This case is the result of the stubborn insistence of petitioners on a most peculiar method of rate publication. In *Combination Rates Over Western-Official Gateways*, 238 I. C. C. 347, 351, the Interstate Commerce Commission strongly suggested to the carriers that they could avoid overcharge claims of this nature and achieve other desirable results by adopting the normal method of publishing one factor through rates. This they refused to do. On an overall basis they gained by this refusal. The record in this case shows that if the recommendation of the Commission had been followed, petitioners could only have increased such rates to the level made over Hurst Mill Spur. After the end of the reparation period, their method of publication resulted in higher rates. Having deliberately

chosen this course of action and obtained the benefits, it ill behooves petitioners to shout "miscarriage of justice" when the operation of well recognized principles of law reduce the amount of the gain.

There is no issue in this case of sufficient general importance to warrant the attention of the United States Supreme Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

General Rules of Practice of the Court of Appeals for the Seventh Circuit.

OPINIONS OF THE COURT.

Rule 23. All opinions released by the court shall, on the same day, be handed to the clerk to be filed, and a copy thereof mailed to counsel for each party. In all cases except that of a decree enforcing the order of an administrative tribunal, judgment shall be entered on the date the opinion is filed. (See Rule 14(1) for decrees in reviews of administrative tribunals.)

MANDATE.

Rule 28. (a) Issuance. Unless otherwise ordered, mandate shall issue as of course 20 days after the entry of judgment unless delayed by the filing of a petition for rehearing within that period. If such petition for rehearing be denied, mandate shall issue 5 days thereafter; if granted, no mandate shall issue until final disposition of the cause.

(b) Stay. A stay of mandate granted pending application for certiorari to the Supreme Court of the United States, shall not exceed 30 days unless extended by order of this court or a judge thereof. However, if within such 30 days, or within any duly allowed extension thereof, there is filed with the clerk of this court a certificate of the clerk of the Supreme Court certifying that the certiorari petition, record and brief have been filed, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the writ of certiorari, the mandate shall issue.